By subsection (2) of section 1 it is expressly provided that the Act "shall be deemed for all purposes to have come into force on February 20, 1971".

Parliament has also made plain by section 9 of the Act its clear intention to validate with retrospective effect the regulations declared *ultra vires* by the court. Subsection (1) of the section provides:

"Every subsidiary legislation whatsoever made or purporting to have been made under the Emergency (Essential Powers) Ordinance, 1969, (hereinafter in this Act referred to as 'the Ordinance') on or after February 20, 1971, shall be valid and have effect as if the said subsidiary legislation has been made under the appropriate provision of this Act and shall be deemed to have come into force from the date on which the said subsidiary legislation came into force or purported to have come into force under the Ordinance, and shall be read with all such modifications as may be necessary to construe such subsidiary legislation as having been made under this Act."

Thus, in our judgment, it is clear that the regulations under which the accused was convicted have been validated and with effect from the date (November 4, 1975) when they purported to have come into force.

It is now convenient to reproduce the words of subsection (3) of section 9 which are as follows:

"Any prosecution instituted, trial conducted, decision or order given, in respect of any person in any court, or any other proceeding whatsoever had, or any other act or thing whatsoever done or omitted to be done, under or by virtue of the Ordinance or any subsidiary legislation whatsoever made or purporting to have been made thereunder is declared lawful and hereby validated."

With respect to Mr. Karpal Singh, we do not think that there is any inconsistency between subsections (1) and (3) of section 9. It is true that the decision of the Privy Council in the instant case that the regulations were *ultra vires* was a "decision given in respect of any person in any court" within the meaning of subsection (3) of section 9, but in our view the effect of the subsection as regards criminal proceedings is limited to validating convictions, sentences and acquittals and other orders in trials conducted in accordance with the regulations before the enactment of the Act, but, because of the explicit language of subsection (1), does not extend to upholding the opinion of the Privy Council formed before the passage of the Act that the regulations were *ultra vires*. To hold otherwise would be to fly in the face of the clear language not only of subsection (1) of section 9, but also of the long title and the preamble.

If we are right, then may we not validate the conviction and sentence of the accused which were upheld by the Federal Court? In our judgment the learned Solicitor-General was right in submitting that we may not. The conviction and sentence have been set aside by His Majesty acting on the advice of the Privy Council and no longer exist, and what we have before us and the only thing that we should consider is the order remitting the case to us to consider whether or not to order a new trial. We are of the opinion that this is a proper case where we should order a new trial and accordingly we so order.

Retrial ordered.

Solicitors: *Karpal Singh & Co.*

YENG HING ENTERPRISE SDN. BHD. v. LIOW SU FAH

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat F.J. & Abdoolcader J.) April 3, 4, and 27, 1979]

[Penang — Federal Court Civil Appeal No. 181 of 1977]

Practice and Procedure — Application to set aside writ and to strike out statement of claim — No reasonable or probable cause of action — Action frivolous and vexatious and an abuse of process of court — Allegation of loans given to purchase shares in company — Non-payment of loan — Whether company could be sued.

The respondent claimed that he had lent moneys to the first defendant and that the moneys have not been repaid by the latter nor by the appellant company nor have they transferred or issued the shares to him. The action was brought both against the first defendant and the appellant company. The appellant company applied for the writ to be set aside and the statement of claim to be struck out on the ground that they disclosed no reasonable or probable cause of action against the appellant company and that they were frivolous and vexatious and an abuse of the process of the court. The learned judge dismissed the application of the appellant company and it appealed to the Federal Court.

Held: (1) the appellant company was not a party to any of the transactions between the respondent and the first defendant and the source of the funds for payment of the shares had nothing to do with the appellant company. In the circumstances the respondent had no reasonable cause of action against the appellant company and the proceedings instituted by him against it are vexatious and frivolous and an abuse of the process of the court and obviously unsustainable;

(2) the statement of claim against the appellant company must be struck out and the action against it dismissed;

(3) the temporary injunction obtained by the respondent against the appellant company became *ipso facto* discharged.

Cases referred to:-

(1) *Cree* v. *Somervail* (1879) 4 App. Cas, 648.
(2) *Re Perkins, Exparte Mexican Santa Barbara Mining Company* (1890) 24 Q.B.D. 613, 616.
(3) *Hawks* v. *McArthur and Others* [1951] 1 All E.R. 22.
(4) *The Jupiter Cigaratte and Tobacco Co. Ltd.* v. *H.C. Henry Soysa* (1971) 74 N.L.R. 241.
(5) *Hongkong Vegetable Oil Company Ltd.* v. *Malim Srinaga Wicker & Ors.* [1978] 2 M.L.J. 13.
(6) *In re Schebsman deceased* [1944] Ch. 83.
(7) *Mackereth* v. *Wigan Coal and Iron Company Ltd.* [1916] 2 Ch. 293.
(8) *Binney* v. *The Ince Hall Coal and Cannel Company* (1866) 35 L.J. (N.S.) Ch. 363.
(9) *Hardoon* v. *Belilios* [1901] A.C. 118.
(10) *The W.H. Randall* [1928] P. 41.
(11) *Hummerstone & Anor.* v. *Leary & Anor.* [1921] 2 K.B. 664.
(12) *The Siskiwa* [1977] 3 W.L.R. 818, 826.
(13) *Teh Cheng Poh* v. *Public Prosecutor* [1979] 1 M.L.J. 50, 53.
(14) *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1978] 2 M.L.J. 227, 228 & 229.
(15) *Felton* v. *Callis* [1969] 1 Q.B. 200, 218-219.

FEDERAL COURT.

T.R. Hepworth for the appellant.

V.K. Palasuntharam (*S.M. Ratnam* with him) for the respondent.

Cur. Adv. Vult.

Abdoolcader J.:

1. *Preliminary: The issue involved.*

The respondent instituted an action in this matter

against the 1st defendant and the appellant, jointly, severally and in the alternative both as to the form and nature of the remedy claimed and the entity sought to be made liable, for such a congeries of unconfined and vagrant relief in the spectral range of money to shares as to make one wonder whether the respondent really knows what he is in fact seeking and from or against whom apart from engaging in an attempt to obtain some sort of redress against one or the other or both of them on the basis of no matter what, no matter who, and even the respondent's claim to entitlement through the 1st defendant to shares in the appellant is advanced as being 1,200,000 or 1,199,999 shares, whichever it may be. In this respect the writ and statement of claim lay bare a field which luxuriates in riotous uncertainty. Whatever it is, the primary question however that has to be determined in this appeal is whether the respondent has a reasonable or indeed any cause of action against the appellant.

2. *Background and facts.*

Briefly (as one can hope to be on the facts and circumstances of this case), the background to this matter, culled from the statement of claim, is that the appellant was formed as a company in or about August 1973 with the respondent and a Tan Kung Gyen as its only members and first directors, primarily with the immediate object of acquiring 2 lots of land in Perak, and at about the same time the respondent and a Hiew Pau who were then the only directors and shareholders in the 1st defendant agreed and the 1st defendant's board of directors resolved that the 1st defendant should take up 30% of the shares in the appellant at the par value of $1 each to put the latter in funds for the purchase of the Perak land and that for this purpose the 1st defendant should borrow initially a sum of $220,000 each and also a further sum of $30,000 each from the respondent and Hiew Pau who accordingly lent these sums to the 1st defendant in August 1973. The 1st defendant then paid $640,000, being the two sums of $220,000 each lent to it by the respondent and Hiew Pau and part of an overdraft from a bank, to the appellant which in turn paid this sum which together with other moneys received from other incoming shareholders amounted to $1,309,093.75 as part payment for the Perak land.

Then again in or about February 1974 the respondent and Hiew Pau agreed and the 1st defendant's board of directors resolved that the 1st defendant should borrow a sum of $980,000 each from the respondent and Hiew Pau who would so lend, and the respondent accordingly paid to the 1st defendant a sum of $980,000 in February 1974 but Hiew Pau paid only a part of that amount which he had agreed to lend. The 1st defendant then gave a sum of $1,760,000, made up of the $980,000 lent by the respondent and the amount received from Hiew Pau together with part of a bank overdraft, to the appellant which in turn paid this sum together with other moneys received from other incoming shareholders and part of an overdraft from a bank for the balance of the purchase price for the Perak land, the total purchase price therefor being in the region of $12,000,000 according to the appellant's balance sheets.

In or about April or May 1974 the respondent and Hiew Pau agreed and the 1st defendant's board of directors resolved that out of the 2,400,000 shares in the appellant paid for by and to be allotted and issued to the 1st defendant in respect of the payment of the sums of $640,000 and $1,760,000 made by the latter to the former, 800,000 shares each should be transferred to the respondent's nominee and Hiew Pau respectively. Then by a deed of arrangement entered into by the respondent and Hiew Pau on January 22, 1975, it was agreed between them that out of the balance 800,000 shares in the appellant which the 1st defendant was entitled to, 400,000 shares each should be transferred to the respondent and Hiew Pau or their respective nominees.

The 1st defendant on an allotment made on June 30, 1974 is registered as a member of the appellant holding 2,399,999 shares in it, according to an amended return dated September 9, 1974 lodged with the Registrar of Companies, but share certificates therefor have not as yet been issued. The respondent and Tan Kung Gyen appear in the appellant's register of members as holding one share each in it.

I should perhaps add that the respondent was a director of the 1st defendant from January 28, 1971 until January 22, 1975 since when Hiew Pau controls the 1st defendant and during which period he and Hiew Pau were its only directors and shareholders, and its managing director from February 22, 1972 until November 1974 when Hiew Pau took over as such. The respondent was also a director of the appellant from August 15, 1973 until July 21, 1976 and its managing director from about August 1973 until about April 1974.

3. *The respondent's claims and summons for interim relief.*

The respondent in his action complains that the moneys lent by him to the 1st defendant have not been repaid by either the latter or the appellant nor have they transferred or issued to him or his nominee 1,200,000 or 1,199,999 shares, whichever it is, in the appellant, and that the latter has as its annual general meeting held on July 2, 1977 resolved to sell the Perak land which is its only substantial asset and that if this were effected by private treaty at a price below the highest obtainable price it would be prejudicial to him.

He then seeks several forms of relief in the alternative and jointly, severally or alternatively against the 1st defendant and the appellant in respect of the moneys he had lent to the 1st defendant and the shares in the appellant he claims to be entitled to, and concludes by asking for a temporary and permanent injunction to restrain the appellant from transferring or agreeing to transfer the Perak land otherwise than for the highest bid pursuant to a sale by public auction and an interlocutory and permanent order that the appellant should keep undisposed of and unencumbered at least $1,200,000 out of the proceeds of any such sale.

The respondent on the very day he filed his writ concurrently took out a summons for the temporary injunction and interlocutory order I have just referred

to and 3 days later, on August 5, 1977, was granted an order in terms by Gunn Chit Tuan J.

4. *The appellant's motion.*

The appellant upon service of the writ entered a conditional appearance and simultaneously applied by motion on August 18, 1977 for the writ or the service thereof to be set aside for irregularity and for the statement of claim to be struck out, no doubt against the appellant only, as disclosing no reasonable or probable cause of action and as being frivolous and vexatious and an abuse of the process of the court, and alternatively for the order of August 5, 1977 to be discharged or varied and the injunction granted to be dissolved. The learned judge dismissed the appellant's motion on September 14, 1977 and it is against this decision that the appellant now appeals, but the appeal is restricted only to his decision on the second and third limbs of the motion and is not against that part which holds the service of the writ on the appellant and the venue of the action to be valid and proper.

5. *Whether the respondent has a cause of action against the appellant.*

The parties to all the transactions I have referred to in the matter of the monetary advances by way of loans to the 1st defendant by the respondent, the 1st defendant taking up shares in the appellant and the allocation of such shares in the appellant as were agreed to the respondent and Hiew Pau were throughout only the respondent, Hiew Pau and the 1st defendant. The appellant which is an entirely distinct and separate juristic entity and personality was not a party to any of these matters. In the matter of the acquisition of shares by the 1st defendant in the appellant, the former was allotted and is registered as the holder of 2,399,999 shares in the latter and the source of the funds for payment by the 1st defendant for these shares has nothing whatever to do with the appellant.

The respondent can of course enforce his rights in respect of the loans he made to the 1st defendant and his claim to entitlement to shares in the appellant against the 1st defendant and perhaps Hiew Pau as well, and it would be open to them to bring in the appellant as a third party to any such proceedings if necessary and so advised. The respondent however has no privity whatsoever with the appellant in any of these transactions with any resulting right of direct enforcement by him against it, and the appellant owes no contractual or other obligation to him.

A company does not take cognisance of trusts except in so far as is provided for in section 163 of the Companies Act, 1965 which should be read in conjunction with its articles of association which usually go beyond the statutory provision by stating that the company shall not be bound to recognise any equitable interest or any other right in a share except an absolute right in the registered holder. This goes beyond section 163 in so far as it relates not merely to the question of registration of the membership right but generally to the recognition of trusts in connection with shares. Now article 10 of the appellant's articles of association which goes beyond the provisions of section 163(4) of the Companies Act expressly stipulates that except as required by law, no person shall be recognised by it as holding any share upon any trust, and it shall not be bound by or be compelled in any way to recognise (even when having notice thereof) any equitable, contingent, future or partial interest in any share or unit of a share or (except only as by its articles or by law otherwise provided) any other rights in respect of any share except an absolute right to the entirety thereof in the registered holder. The *cestui que trust* of shares in a company cannot be made liable either as a shareholder or as a contributory for there is no privity of contract between him and the company (*Cree* v. *Somervail*[1]). In *Re Perkins, Ex parte Mexican Santa Barbara Mining Company*[2] (at page 616), Lord Coleridge C.J., said:

> "In the first place, it seems to me extremely important not to throw any doubt on the principle that companies have nothing whatever to do with the relation between trustees and their *cestuis que* trust in respect of the shares of the company. If a trustee is on the company's register as the holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company have nothing whatever to do; they can look only to the man whose name is upon the register."

It is therefore of no concern of or to the appellant whether or not the 1st defendant holds any of the 2,399,999 shares registered in its name in the appellant on trust for the respondent or any one else.

Hawks v. *McArthur & Ors.*[3] on which Mr. Palasuntharam for the respondent sought to rely before the learned judge is of no assistance to the point in issue as that case involved the basic principle that the first in time prevails where there are competing equities in holding that a charging order only operates to charge the beneficial interest of the person against whom the order is made, and that it is not possible, for instance, to obtain an effective charging order over shares where the registered owner has divested himself of his beneficial interest therein. And equally the decision of the Privy Council in *The Jupiter Cigarette & Tobacco Co. Ltd.* v. *H.C. Henry Soysa,*[4] a hypothecary action instituted against the appellant company in that case to enforce a mortgage bond which he also cites in support of the respondent's case, to the effect that a person who had paid for shares some of which were to be registered in his own name and some in that of his nominees would even before the registration of any of the shares be the beneficial owner thereof, does not assist either and can be clearly distinguished as the position in the matter before us is quite different in that the respondent claims to be entitled to shares in the appellant through the 1st defendant and not directly against the appellant and the right he claims as beneficial owner of the shares held by the 1st defendant in the appellant would lie and be enforceable if at all only against the former and not the latter.

All the other cases referred to by Mr. Palasuntharam are equally irrelevant in the context of this appeal as they can be differentiated and distinguished on their particular facts and circumstances and pertain to questions of priorities, liens, charges and equitable mortgages of shares in a company, and furthermore deal with the situation where one company is involved and not two as in this appeal where the respondent claims to be entitled to shares in the appellant through the 1st defendant. For instance, the

English suit referred to in *Hong Kong Vegetable Oil Company Ltd.* v. *Malin Sirinaga Wicker & Ors.*,[5] which Mr. Palasuntharam says he is relying on by way of analogy, was based on a different set of facts and there were in that suit *inter alia* declarations of trust of the shares in question by two of the defendants in favour of the plaintiffs. *In Re Schebsman, deceased*,[6] was a case pertaining to the matter of a contract for the benefit of a third party and involved money. *Mackereth* v. *Wigan Coal and Iron Company Limited*[7] dealt with the question of a lien on shares and the article of association in question in that case differs from article 10 of the appellant's articles of association in that there was no provision in the former to exclude recognition of a trust or equitable interest in shares even when the company had notice thereof. *Binney* v. *The Ince Hall Coal and Cannel Company*[8] was concerned with an equitable mortgage of shares and the right of the equitable mortgagee to sue the company by way of a derivative action. *Hardoon* v. *Belilios*[9] held that a person beneficially entitled to shares was personally bound to indemnify the registered holder thereof against calls upon them.

Mr. Palasuntharam contends that the provisions of Order 16 rule 4 of the Rules of the High Court, 1957 entitle the respondent to proceed against both the 1st defendant and the appellant in these proceedings, but although that rule enables all persons to be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, it in fact refers to co-defendants with substantially co-ordinate liability but possibly to some extent based on different grounds and there must be a cause of action as such although perhaps technically different in form against each of the defendants so joined, and this was indeed the case in *The W.H. Randall*[10] and *Hummerstone & Anor.* v. *Leary & Anor.*[11] which Mr. Palasuntharam referred to in support of his submission before the learned judge in which joint tortfeasors were involved. A defendant improperly joined may apply to be struck out under rule 11 of Order 16 or to have the statement of claim against him set aside.

In the course of his submission in this appeal Mr. Palasuntharam has taken the point, and I would add for the first time before us as it was not made before the learned judge, that the resolution of the 1st defendant's board of directors that 800,000 shares in the appellant should be transferred to the respondent's nominee amounted to an assignment of those shares by the 1st defendant to the respondent and also that an assignment was similarly effected by the 1st defendant to the respondent or his nominee of 400,000 shares in the appellant by virtue of the deed of arrangement entered into by the respondent and Hiew Pau on January 22, 1975, contending on the latter aspect that this deed of arrangement between the respondent and Hiew Pau was in effect a resolution of the 1st defendant to transfer these 400,000 shares in the appellant to the respondent. He is unable however to say how if at all an assignment of the shares in question was created as a result in favour of the respondent, cannot cite any authority for this proposition and that to the effect that the deed of arrangement of January 22, 1975 between the respondent and Hiew Pau has since metamorphosed and evolved into a resolution of the 1st defendant and merely urges us in so many words to accept his submissions on these points on his *ipse dixit*. Suffice it to say that there is neither substance nor merit in the submission made in this respect; I can find nothing to commend it except its audacity and I reject the contention advanced. When Mr. Palasuntharam towards the end of his submission, while maintaining that it is open to him to raise the question of an assignment on the respondent's statement of claim as it stands which he says need only state facts and not contentions of law, applied to amend the respondent's statement of claim to plead an assignment *ex abundanti cautela*, as he put it, his application was accordingly refused.

Mr. Palasuntharam further submits that the orders sought by the respondent directing the appellant to issue to the 1st defendant or alternatively to him the share certificates for 1,200,000 or 1,199,999 shares in it and to register him as a member of it and for the temporary injunction in connection with the sale of the Perak land are in fact relief under the provisions of section 181(1)(b) and (2)(a) of the Companies Act, and that this clearly shows that the respondent as the beneficial owner of 1,200,000 or 1,199,999 shares, whichever it is, has a cause of action against the appellant — a conclusion which I would at once say involves the fallacy of *petitio principii* or, in the vernacular, an attempt to pull oneself up by one's own bootstraps, as Lord Diplock put it in *The Siskina*[12] (at page 826) and again in *Teh Cheng Poh* v. *Public Prosecutor*[13] (at page 53), as it only begs the question.

The submission that the relief sought against the appellant is under section 181 of the Companies Act raises several matters for consideration and comment. Proceedings under section 181 should be by way of originating motion, the procedure accepted by the Privy Council to be in accordance with our law (*Re Kong Thai Sawmill (Miri) Sdn. Bhd.*[14]) (at page 228), or perhaps even by originating summons in the light of the provisions of Order 53B rule 15 of the Rules of the High Court, but not by writ, and the motion or summons should specify clearly the grievance alleged and the relief sought under that provision. The writ and statement of claim in this action in any event do neither, nor is there any indication at all in the respondent's pleading that a remedy or relief under section 181 is sought against the appellant. The relief under that section would only be available to the respondent as a member of the appellant but he however holds only one share in it. His claim in these proceedings appears however to be predicated on his would-be entitlement to 1,200,000 or 1,199,999 shares in it but in respect of which he is not a member. The ground for relief under section 181(1)(b) would only be available to him in respect of any act which unfairly discriminates against or is otherwise prejudicial to him as a member of the appellant. He cannot in respect of his several claims be prejudiced as a member holding only one share by reason of the appellant not having issued share certificates in favour of another member, namely, the 1st defendant. The respondent must be aggrieved as a member *ex vi termini* and not as a person claiming

only an equitable interest in shares held by some other member of the appellant, in this case the 1st defendant, and article 10 of the appellant's articles of association makes the position clear *ob majorem cautelam*. Even if the respondent is entitled to institute a minority shareholder's action against the appellant for any reason, relief cannot be sought under section 181 merely because facts are established which would found a minority shareholder's action (*Re Kong Thai Sawmill (Miri) Sdn. Bhd.*[14]) (at page 229).

In any event, no relief under section 181 can possibly lie in respect of the proceedings at the annual general meeting of the appellant held on July 2, 1977 when it was resolved to sell the Perak land as no question has been raised as to the regularity of that meeting or the notice thereof and the notice of that meeting sets out the resolution to be passed in clear, specific and unequivocal terms for the sale of the Perak land at the best market price possible, and furthermore there is no plea or any indication whatsoever that the respondent's proxy who attended that meeting on his behalf made any objection to the resolution in question. I would add that according to a letter dated July 7, 1977 to the respondent from his proxy, the sale would be for a minimum price of $5,920,000 based on a valuation report by a firm of valuers "but with a view to sell the same at the original acquisition price of the said land, plus interest and costs as proposed by (the respondent)."

In the circumstances I have adumbrated, it is abundantly clear that the respondent has no reasonable cause of action enforceable against the appellant, and the proceedings instituted by him against it are vexatious and frivolous and an abuse of the process of the court and obviously unsustainable.

6. *The order of August 5, 1977.*

I need only add that it follows that the order of August 5, 1977 should not have been granted as the respondent had no right in the circumstances to the temporary injunction sought by him as, if there is no cause of action against the appellant, there can be no serious question to be tried between them, nor was he entitled in any event to the interlocutory order in respect of a sum of at least $1,200,000 out of the proceeds of sale on a summons that was not merely interlocutory but also *ex parte* and made previous to service of the writ and before appearance was entered and seeking a mandatory order that in the event of a sale of the Perak land for the highest bid by public auction the appellant should keep undisposed of and unencumbered at least that amount out of the proceeds of any such sale, and I would refer in the latter respect to *Felton* v. *Callis*[15] (at page 218-219) which held that even where a cause of action subsists it would require an exceptional case to justify making a mandatory order in such circumstances and the court should be most reluctant to make an order for the mere payment of a sum of money, and, I would interpose and add parenthetically, for that matter, for freezing a person's assets, in this case the appellant's funds to the extent of some $1,200,000, as this would virtually amount to circumventing the provisions of Order 14 of the Rules of the High Court and, quite apart perhaps from also raising the spectre of undue preference in the light of the resolution of the appellant for the sale of the Perak land disclosing its indebtedness to other creditors for a substantial sum, in effect giving the appellant *in limine* only the equipollent of conditional leave to defend the action — and all this all the more so when the respondent had lent the moneys in question not to the appellant but to the 1st defendant for the latter to purchase shares in the appellant and the respondent has accordingly no privity with or claim against the appellant in respect thereof.

7. *Conclusion.*

I would accordingly allow the appeal, set aside the order made on September 14, 1977 and strike out the statement of claim in so far as it relates to the appellant as 2nd defendant in these proceedings and dismiss the action against it with the inevitable result that the order of August 5, 1977 is *ipso facto* discharged. The appellant will have its taxed costs of the action including its motion and the costs of this appeal. The deposit lodged in court by way of security will be paid out to the appellant.

Raja Azlan Shah C.J. (Malaya) and **Chang Min Tat F.J.** concurred.

Appeal allowed.

Solicitors: *Allen & Gledhill; S.M. Ratnam & Co.*

CENTRAL SECURITIES (HOLDINGS) BHD. v. HARON BIN MOHAMED ZAID

[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya) and Wan Suleiman F.J.) February 26, March 2 and May 16, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 105 of 1978]

Practice and Procedure — Third party notice — Application for final judgment against third party — Whether there is question proper to be tried between defendant and third party — Application for consolidation — Transfer of shares, — Register of members — Rectification by company — Delay in bringing action — R.S.C. 1957, O. 14.

Company Law — Register of members — Rectification — Transfer of shares — Companies Act, 1965 (Act. 125), ss. 103 & 162.

Contract — Sale of shares — Contract not severable — Restitution — Breach of warranty — Sale of Goods Act, 1957, ss. 13(2), 38 and 59.

The respondent in this case had agreed to sell 560,000 shares to a company, which he in turn bought from the third party (appellants). The company paid the total sum for the shares but later discovered that the instrument of transfer in respect of 523,278 shares had been executed in favour of International Holdings (Pte.) Ltd. In the meantime the shares were registered in the name of the company. The company brought an action for the refund of the purchase price paid in respect of the 523,278 shares, damages, interest and costs. The respondent, the defendant to that action, took out a third party summons against the appellants. The respondent submitted to judgment and the learned trial judge gave leave to the company to enter final judgment by consent. The application of the appellants to set aside the third party notice was dismissed and the learned trial judge gave leave to the respondent to enter final judgment against the appellants. The appellants appealed and contended that (a) there was a question proper to be tried between the respondent and the appellant in that the agreement had been performed and (b) the issue between the respondent and the appellant formed the subject of a separate action and the learned trial judge was wrong in refusing to allow consolidation.